STATE OF MICHIGAN

COURT OF APPEALS

KENT POWER, INC,

Petitioner-Appellant,

V

CITY OF TRAVERSE CITY,

Respondent-Appellee.

UNPUBLISHED
May 9, 2006

No. 266230
Michigan Tax Tribunal
LC No. 00-312710

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Petitioner appeals as of right the orders of the Michigan Tax Tribunal (MTT), granting respondent's motion for summary disposition under MCR 2.116(C)(4) and (C)(8) for a lack of jurisdiction and failure to state claims upon which relief may be granted. We affirm.

Petitioner had equipment located in Traverse City on tax day, December 31, 2002. Petitioner filed an untimely 2003 personal property statement and listed property with an alleged true cash value of $24,838. Respondent notified petitioner that it did not believe petitioner had fully disclosed the value of its property, and it sent petitioner a copy of eleven photographs taken at the job site where petitioner's equipment was located on December 31, 2002. Respondent subsequently sent petitioner a formal assessment of $300,000 based on personal property with a true cash value of $600,000. Petitioner claimed in response that it only owned five pieces of equipment depicted in the photographs, and it alleged a true cash value of $52,000. By July, 2004, respondent took the position that the $300,000 assessment was based solely on the five pieces of equipment petitioner admitted owning.

Petitioner protested with the December Board of Review in December, 2004, claiming a mutual mistake of fact or clerical error. The board rejected petitioner's claim, and petitioner subsequently filed a petition with the MTT on January 14, 2005. Respondent moved to dismiss the petition pursuant to MCR 2.116(C)(4) and (C)(8), claiming that petitioner had failed to invoke the MTT's subject matter jurisdiction and also failed to state claims on which relief could be granted. The MTT eventually granted respondent's motion, and petitioner appeals.

Petitioner first argues that it was error for the MTT to find that its petition had failed to invoke the tribunal's subject matter jurisdiction. We disagree.

The exclusive and original jurisdiction of the Tax Tribunal is provided for in the Tax Tribunal Act, MCL 205.701 *et seq*., which provides in relevant part, that the MTT has jurisdiction over:

> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws. [MCL 205.731.]

Petitioner argues that it has invoked jurisdiction based on subject matter "relating to" an assessment because respondent "wrongfully assess[ed] it for property it did not own." While this may be true, MCL 205.735 provides an additional jurisdictional requirement, *Electronic Data Systems Corp v Flint Twp*, 253 Mich App 538, 543; 656 NW2d 215 (2002), which petitioner failed to meet. That statute provides:

> The jurisdiction of the tribunal in an assessment dispute is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved. [MCL 205.735(2).]

The tax year involved in petitioner's dispute is 2003, and petitioner did not file its petition with the MTT until January 14, 2005. It has therefore failed to meet this jurisdictional requirement, and the MTT's decision, finding no jurisdiction over petitioner's challenges to the assessment, is affirmed.

Petitioner next argues on appeal that it was error for the MTT to conclude that it failed to state any claims for relief based on mutual mistake of fact or clerical error. We disagree.

MCL 211.53a provides that:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

The statute clearly provides relief only to taxpayers who have paid an excess tax. Respondent contends, and petitioner does not dispute, that petitioner never paid the taxes at issue here. Therefore, petitioner is not entitled to relief under MCL 211.53a and the MTT appropriately granted respondent's motion for summary disposition on any claim that may have been made under that subsection.

Additionally, petitioner failed to state a claim of mutual mistake upon which relief could

be granted under MCL 211.53b. MCL 211.53b permits correction of an assessment based on a mutual mistake of fact. This Court previously determined that the phrase "mutual mistake of fact," as used in MCL 211.53a, means a shared or common error, misconception, misunderstanding, or erroneous belief about a material fact. *Ford Motor Co v Bruce Twp,* 264 Mich App 1, 6-7; 689 NW2d 764 (2004). Both the taxpayer and assessing officer must share the same erroneous belief regarding the same material fact in order for relief to be granted based on a mutual mistake of fact. *Id.* at 9. Because MCL 211.53a and MCL 211.53b relate to the same subject matter, that being relief for taxpayers based on mistakes of fact and clerical errors, we adopt the definition of "mutual mistake of fact" provided by this Court in *Ford, supra,* and apply it to MCL 211.53b. We do so because statutes, which are in pari materia, should have harmonious construction. See, e.g., *People v Izarraras-Placante,* 246 Mich App 490, 498; 633 NW2d 18 (2001).

Applying that definition to the allegations in petitioner's petition, we find that no mutual mistake of fact was pleaded. Petitioner argues that both parties were mistaken regarding the time within which petitioner had to file its personal property tax statement and whether respondent would base the assessment on that statement. However, petitioner's mere allegations, that it requested additional time to file its statement and believed that the assessment would be based on the statement, do not support that respondent was mistaken with respect to either of those matters. Moreover, petitioner's claim that there was a mutual mistake of fact regarding whether the assessor utilized the proper procedures in assessing petitioner's equipment also fails. Petitioner explicitly admits in its brief on appeal that respondent believed it followed proper procedure. Thus, there could be no mutual mistake with respect to the required procedure. Because the allegations in the petitioner were insufficient to support the existence of any mutual mistake in the assessment, petitioner was not entitled to relief for a mutual mistake of fact under MCL 211.53b.

Finally, we reject petitioner's argument that it is entitled to relief under MCL 211.53b on the basis that respondent made a clerical error. MCL 211.53b permits correction of an assessment if the assessment was based on a clerical error. The Tax Tribunal, looking beyond the pleadings of the parties, determined that there was no clerical error in this case. Although respondent's motion for summary disposition in the Tax Tribunal was brought pursuant to MCR 2.116(C)(8), which must be decided on the pleadings alone, the Tax Tribunal's decision was clearly made under MCR 2.116(C)(10). If summary disposition is granted under one subpart of a court rule, when it was actually appropriate under another, appellate review is not precluded as long as the record permits review under the correct subrule. *Brown v Drake-Willock Int'l, Ltd,* 209 Mich App 136, 143; 530 NW2d 510 (1995).

In this case, there was evidence before the Tax Tribunal that the assessor meant the assessment charged and did not erroneously add an additional number to the taxable value. A clerical error, as used in MCL 211.53b, refers only to errors of a typographical, transpositional, or mathematical nature. *Int'l Place Apartments v Ypsilanti Twp,* 216 Mich App 104, 109; 548 NW2d 668 (1996). Petitioner has not, either in the Tax Tribunal or on appeal, offered any evidence, or made any claim that such evidence exists, to support that there was a clerical error.

It relies on its own speculation and conjecture in this regard. Speculation and conjecture are insufficient are insufficient to raise a genuine issue of fact to avoid summary disposition. *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001); *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977). Because no genuine issue of material fact exists on the issue whether a clerical error occurred in the challenged assessment, summary disposition is appropriate pursuant to MCR 2.116(C)(10). We thus affirm the Tax Tribunal's order dismissing plaintiff's "clerical error" claim.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder